



1629 K STREET, N.W. SUITE 300
WASHINGTON, DC 20006

November 26, 2018

SUBMITTED ELECTRONICALLY VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **MEETING SUMMARY PER SECTION 1.1208 OF THE FCC'S RULES**
Schools and Libraries Universal Service Support Mechanism,
Docket No. 02-6

Dear Ms. Dortch:

This letter, submitted on behalf of Education Networks of America and ENA Services, LLC (collectively, ENA), provides additional information regarding the Request for Waiver filed in 2013 by the Tennessee Consortium.¹

As noted in ENA's ex parte filed Nov. 14, 2018,² ENA explained that its contract with Metro Nashville Public Schools (MNPS) was a master contract executed following MNPS's 2011 E-rate compliant procurement. The Bureau asked whether the contract executed following that procurement was modified when additional districts wanted to purchase off that contract in 2012. Because the contract was only between ENA and MNPS, there was no modification to the master contract when other school districts opted in.

Further, Commission precedent and Tennessee state law do not require additional competitive bidding when a master contract was competitively bid. That is what happened here.³

¹ Request for Waiver, *In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Tennessee Consortium (filed February 11, 2013) (Tennessee Consortium Waiver Request); Ex Parte Letter from Gina Spade, counsel for ENA, to Marlene H. Dortch, Secretary, Federal Communications Commission dated November 14, 2018.

² In that meeting, as detailed in the Nov. 14 ex parte, Kitty Ganier, ENA's general counsel; and Gina Spade, Broadband Legal Strategies, counsel for ENA, met with D'wana Terry, associate chief of the Wireline Competition Bureau; Ryan Palmer, division chief of the Telecommunications Access Policy Division (TAPD); Gabriela Gross, deputy division chief, TAPD; Aaron Garza, attorney-advisor, TAPD; and Ike Ofobike, attorney-advisor, TAPD.

³ See 47 C.F.R. § 54.500; Tenn. Code Ann. §§ 12-3-1203(c).

As referenced at the meeting with the Bureau, ENA is also submitting an opinion of Professor George W. Kuney, a contracts expert at the University of Tennessee College of Law, that addresses these issues under federal regulations and Tennessee law.⁴

1. Background

On February 4, 2011, MNPS issued a Request for Proposal for managed Internet access, Voice over IP and video conferencing services (RFP).⁵ MNPS requested proposals for these services on behalf of itself and the “Tennessee E-rate Consortium (Consortium).”⁶ The Consortium was comprised of 79 public school districts that had given MNPS permission via a letter of agency to seek services on their behalf.⁷ The RFP stated a service provider had to be able to serve all of the districts in the procurement.⁸ The RFP also stated that:

The method for all of the K-12 public school districts of Tennessee to purchase from this contract is TCA Title 12, Chapter 3, Part 10, which effectively allows Local Education Agencies, hereafter referred to as [LEAs], to make purchases based on the terms of a contract signed by another LEA.⁹

ENA Services, LLC and AT&T responded to the bid.¹⁰ ENA was selected as the most cost-effective vendor.¹¹ MNPS and ENA Services, LLC executed a contract on March 7, 2011 (MNPS-ENA Contract).¹² The term of the contract was from July 1, 2011 to June 30, 2016.¹³

There was never a contract between ENA and the “Tennessee Consortium.” The Tennessee Consortium is not a legal entity, and therefore it cannot issue RFPs or enter into contracts.

⁴ See Exhibit 1, Letter from Professor George W. Kuney, University of Tennessee College of Law, to Kitty Ganier, General Counsel, ENA, dated November 12, 2018 (Kuney Opinion).

⁵ Exhibit 2, excerpts as discussed in the meeting from Request for Proposal, Number 11-4, Metropolitan Nashville Public Schools on Behalf of the Metropolitan Board of Public Education, RFP Title: Managed Internet Access, Voice-Over-IP and Video Conferencing, dated Feb. 4, 2011 (MNPS RFP).

⁶ *Id.* at 4.

⁷ *Id.* at 4, 5.

⁸ *Id.* at 5.

⁹ *Id.* at 4.

¹⁰ Letter from Jim Smith, Davis Wright Tremaine, counsel for ENA, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated October 1, 2014 at 6 (ENA 2014 Ex Parte).

¹¹ In the Matter of Tennessee E-rate Consortium, Request for Waiver, CC Docket No. 02-6 (February 10, 2013) at 2 (Tennessee Consortium Waiver Request).

¹² Exhibit 3, Contract Between Metropolitan Nashville Public Schools on Behalf of the Metropolitan Board of Public Education and ENA Services, LLC for Purchase of Goods and Services, dated March 7, 2011 (MNPS-ENA Contract).

¹³ *Id.* at 2.

MNPS used the term to describe the collection of districts in the RFP and in its waiver request.¹⁴

In the fall of 2011, 43 additional school districts in Tennessee sought to use the contract awarded by the Consortium the prior year to purchase services. These school districts were not listed in the initial RFP because they had decided to use a different master contract for funding year 2011.¹⁵

During a USAC E-rate training session in September 2011, one of USAC's slides explained that E-rate applicants could join a consortium as long as the letter of agency was signed before an E-rate application was filed.¹⁶ At the training, the MNPS E-rate coordinator asked whether additional school districts could join the Tennessee Consortium based on the information in that slide.¹⁷ He then followed up with two emails to USAC, receiving written confirmation from USAC that districts could join the consortium even though they had not been listed on the original FCC Form 470.¹⁸

The 43 school districts individually decided to file FCC Form 471 applications for funding year 2012 using the terms and conditions of the MNPS-ENA Contract.¹⁹ Before filing their individual Forms 471, each school district told ENA it intended to take services off of the MNPS-ENA Contract.²⁰ ENA also prepared a quote for the services that specific school districts wanted to purchase from the contract.²¹ Also pursuant to USAC's guidance, each applicant signed a letter of agency with MNPS.²² Each applicant then filed its own Form 471 seeking funding.

¹⁴ In some cases, a consortium may be a legal entity.

¹⁵ See ENA 2014 Ex Parte at 1. As described further below, school districts in Tennessee have multiple master contracts to select from, in addition to conducting their own competitive bidding process, if they so choose.

¹⁶ Exhibit 4, Slide from E-rate Training; *see also* Tennessee Consortium Waiver Request at 3.

¹⁷ Tennessee Consortium Waiver Request at 3.

¹⁸ Exhibit 5, Email from Tom Bayersdorfer, MNPS E-rate coordinator, to Catriona Ayer, USAC, dated September 27, 2011. Exhibit 6, email from Leslie Frelow, USAC, to Tom Bayersdorfer, MNPS E-rate coordinator, dated October 6, 2011; *see also* Tennessee Consortium Waiver Request at 3-4.

¹⁹ *Id.*

²⁰ See, e.g., Exhibit 7, Intent to Purchase Internet Access Services between Athens City Schools and ENA dated January 30, 2018.

²¹ See, e.g., Exhibit 8, Quote for Athens City Schools for 2012-13 year and 471 Pricing Schedule for 2012-13.

²² See, e.g., Exhibit 9, Letter of Agency signed by Athens City Schools.

USAC then issued FCDLs denying funding requests for most of the new consortium members.²³ Based on guidance from the Wireline Competition Bureau, the applicants sought a waiver from the Commission.²⁴

2. The ENA-MNPS Contract was a Master Contract Under Commission Regulations

In 1997, the Commission established that E-rate applicants can take services off a “master contract” negotiated by a third party.²⁵ Specifically, the rule states that:

A “master contract” is a contract negotiated with a service provider by a third party, the terms and conditions of which are then made available to an eligible school, library, rural health care provider, or consortium that purchases directly from the service provider.²⁶

The Commission required that only the master contract be competitively bid.²⁷ The Commission explained that when E-rate applicants take service out of a master contract, they do not have to conduct a competitive bid themselves.²⁸ The Commission did not place any limitation on the number of E-rate applicants that could purchase off the master contract.²⁹ The Commission did not say the “third party” cannot be another E-rate applicant. The *Fourth Order on Reconsideration* also contemplates that E-rate applicants will purchase services using the terms and conditions from master contracts after the initial year of their formation.³⁰ An applicant purchasing off the master contract does not become a party to the contract.³¹ Many other master contracts exist for E-rate services.³² Many of the master contracts are issued by state governments, but a state master contract is an example of a master contract, not the only type.³³

²³ *ENA 2014 Ex Parte* at 2.

²⁴ Tennessee Consortium Waiver Request.

²⁵ *Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45 et al., Fourth Order on Reconsideration et al., 13 FCC Rcd 5318, 5482, para. 232 (1997) (*Fourth Order on Reconsideration*).

²⁶ 47 C.F.R. 54.500.

²⁷ *Fourth Order on Reconsideration*, at para. 233.

²⁸ *Id.*

²⁹ *Id.* at paras. 232-235.

³⁰ *Id.* at para. 234..

³¹ *In the Matter of Request for Review of Decision of the Universal Service Administrator by Paterson School District*, 21 FCC Rcd. 13101, 13102, para. 3 (2006) (*Paterson*).

³² For example, other types of master contracts include large regional or nationwide contracts, such as the U.S. Educational Technology Purchasing Alliance (USETPA) E-rate contracts. See <http://www.usetpa.org/e-rate.html>.

³³ See, e.g., *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870 (2014), para. 274.

The MNPS-ENA contract was a master contract.³⁴ MNPS and ENA entered into the contract after it was competitively bid in accordance with Tennessee law and E-rate rules. The terms and conditions of that contract were made available to eligible school districts. Those school districts then purchased directly from ENA.

In a separate discussion in the *Fourth Order on Reconsideration* regarding whether applicants could amend their contracts, the Commission also noted that if an E-rate applicant amended its contract in more than a minor way, it must rebid for those services.³⁵ Because the MNPS-ENA Contract was a master contract, it was not modified when other school districts used its terms and conditions. Therefore, other school district using the contract did not require rebidding. In 2012, as described above, when the 43 school districts in 2012 wanted to use the terms and conditions of the MNPS, they did not become parties to the MNPS-ENA Contract. The MNPS-ENA Contract was not amended to allow these school districts to purchase services from the MNPS-ENA Contract.³⁶ There was no need for an amendment as the relevant terms and conditions for each of these school districts to use were already in the MNPS-ENA Contract.

Both the statutory language itself and the RFP gave potential vendors notice and ensured that no vendor would be surprised that there might be other school districts in Tennessee that would want to take advantage of the “lower rates than an eligible entity negotiating on its own behalf” would be able to secure.³⁷ That notice constituted “sufficient information” for vendors to submit bids, as required by Commission rules.³⁸ As noted above, Tennessee law allows any other public entity to purchase services off of another district’s contract for services. Vendors wishing to serve public entities in Tennessee should be aware of this statute. In addition, MNPS included a citation to the Tennessee law in the RFP, clearly stating that all public schools can take services from another public entities contract. The way the RFP was structured allowed vendors to submit bids for school districts of various sizes, so that the pricing could be tailored to different districts’ needs.

3. Tennessee Law Encourages School Districts to Purchase Off Another School District’s Contract

Similarly, Tennessee law allows public entities to purchase off of other public entity contracts.³⁹ In Tennessee, school districts that purchase off a contract entered into by another Tennessee

³⁴ Kuney Opinion at 3.

³⁵ *Fourth Order on Reconsideration*. at para. 234.

³⁶ Kuney Opinion at 3, 5.

³⁷ *Fourth Order on Reconsideration* at para. 232. On the other hand, the procurement did not require any of the other public entities—even those specifically listed on the RFP—to purchase services from the contract. Therefore, the companies submitting bids could not have been relying on certain volume or basing bids on location of schools because there was no guarantee they would take services at all after the contract was executed.

³⁸ 47 C.F.R. § 54.503(c)(1)(ii) (2011).

³⁹ Tenn. Code Ann. § 12-3-1203(c).

local government unit are statutory beneficiaries of the contract, not parties to it.⁴⁰ Just as with the Commission's E-rate rules, Tennessee law also exempts school districts that take services from another public entity contract from conducting their own competitive bidding process.⁴¹ Tennessee law also requires the public entity that takes services from another public entity's contract to independently purchase services.⁴²

The MNPS-ENA Contract was a contract executed by a public entity that other public entities could purchase off of. The MNPS-ENA Contract was a statewide master contract as, by Tennessee law, it is available statewide. Under Tennessee law, the original contract between MNPS and ENA was undisturbed when other school districts used its terms and conditions to purchase services. The school districts did not need to conduct an additional competitive bidding process under state law. Each of the school districts independently purchased services from ENA.⁴³

In addition to the MNPS-ENA Contract, school districts in Tennessee in 2012 had additional options for purchasing services. School districts were not legally required to purchase any services from the MNPS-ENA Contract. AT&T was the vendor under a separate Tennessee state master contract that was available to schools and other governmental agencies. School districts were free to choose services under one of these two contracts or they were free to conduct their own competitive bidding process. There is no evidence of market failure. Indeed, Tennessee has a robust and competitive market with plenty of options for E-rate applicants to obtain the most cost-effective services.

4. Allowing School Districts to Purchase Services from a Master Contract is Not Only Allowed by Commission Rules, It is Good Policy

As the Commission has acknowledged many times, E-rate applicants have an incentive to obtain the most cost-effective services because they have to pay the non-discount share cost of the services.⁴⁴ Tennessee school districts and their governing boards are accountable to their taxpayers and to the Tennessee Comptroller. The Commission should continue to rely upon competitive bidding and the E-rate applicant's incentive to get the best deal for itself, as it has done for the past 20 years. As such, it is a good public policy to allow E-rate applicants to take

⁴⁰ See Kuney Opinion at 4.

⁴¹ *Id.*

⁴² Tenn. Code Ann. § 12-3-1203(c)(1); Kuney Opinion at 5.

⁴³ As with any other master contract, E-rate rules do not require E-rate applicants to have a separate contract with the service provider. In this instance, however, the 43 school districts each received a quote from ENA, Exhibit 8, and indicated their desire to take services from the MNPS-ENA contract by signing a letter of intent with ENA. Exhibit 7.

⁴⁴ See, e.g., Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 at 9341-42 (1997); *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, 14 FCC Rcd 13734, ¶ 29 (1999).

services from a master contract where E-rate applicants can get a better deal than they would be able to obtain on their own.

The Commission could clarify in the future that an RFP should clearly state that a resulting contract may be used by other E-rate applicants, as was done here. That way, there could be no confusion on the part of vendors that the rates they are providing might be available to other E-rate applicants.⁴⁵ The reliance on notice to vendors is also consistent with other program competitive bidding rules. For example, if an E-rate applicant has a criterion for vendors that is so important it will disqualify any vendor who does not meet that criteria, it can do that, as long as the RFP states that information for potential vendors.⁴⁶ The Commission wants vendors to have a level playing field, and such notice would provide that level playing field.

For this appeal, the Commission does not need to reach the question of whether there should be a limit on the number of applicants that could become parties to an existing contract or whether adding parties to a contract constitutes more than a “minor modification” to the contract. Here, the school districts taking services from the MNPS-ENA Contract did not become parties to the contract, and therefore, there was no modification.

Further, master contracts will be rebid. The Commission has not adopted a limit on the length of contracts, but most applicants balance the desire for the better pricing that initially comes with a longer-term contract against the knowledge that pricing on a per-bandwidth basis continues to decrease.⁴⁷ The Tennessee state master contract that was won by AT&T had a 10-year term. The MNPS-ENA Contract had only a five-year term, beginning in July 2011 and expiring as of June 30, 2016. The addition of more users did not extend that contract; those districts joined for a maximum of four years. MNPS issued a new RFP and recontracted for the services under the MNPS-ENA Contract 2½ years ago as anticipated by the 2011 contract.

⁴⁵ Such notice would have the added benefit that third parties would not have to obtain a letter of agency from every potential applicant that could take service from the contract, thereby allowing E-rate applicants who possibly were not even aware of the procurement in the first year to nevertheless take advantage of it.

⁴⁶ See, e.g., *Requests for Review of Decisions of the Universal Service Administrator by Allendale County School District*, CC Docket No. 02-6, Order, 26 FCC Rcd 6109, 6117-18 ¶ 13 (Wireline Comp. Bur. 2011).

⁴⁷ In the *First Modernization Order*, the Commission sought comment on whether to limit the length of a contract but did not adopt its proposal to limit the term of an E-rate supported contract to five years (“Some commenters suggested that five years was the right length for E-rate supported contracts. However, the record is not particularly robust on how a five-year maximum contract length would affect schools’ and libraries’ ability to purchase from state master contracts, which often exceed five years, or to enter into contracts that seek to spread the cost of infrastructure builds over many years.”) *First Modernization Order* at paras. 271-72.

5. Conclusion

As demonstrated above, Commission precedent and Tennessee state law allowed the MNPS-ENA master contract to be used to purchase services without additional competitive bidding by other E-rate applicants, including the ones that are the subjects of this waiver request.⁴⁸

Importantly, granting this appeal would simply allow *eligible* school districts to receive funding for *eligible* services that were purchased from a contract that was competitively bid in accordance with E-rate requirements.

As such, ENA respectfully requests that the Commission grant the Tennessee Consortium's request for waiver as expeditiously as possible, given that the waiver was submitted in 2013. If the Commission wishes to address other issues, we respectfully ask that it consider those in a separate proceeding so as not to further delay this decision.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed for inclusion in the above-referenced docket and courtesy copies are being sent to the attendees. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,



Gina Spade
Broadband Legal Strategies

Counsel for Education Networks of America

cc: D'wana Terry (via email)
Ryan Palmer (via email)
Gabriela Gross (via email)
Ike Ofobike (via email)
Aaron Garza (via email)
Charles Cagle (via email)
Kitty Ganier (via email)

⁴⁸ See 47 C.F.R. § 54.500; Tenn. Code Ann. §§ 12-3-1203(c).

EXHIBIT 1

Professor George W. Kuney
The University of Tennessee College of Law
1505 W. Cumberland Ave., Suite 202
Knoxville, TN 37916
(865) 974-2500

Via E-mail kganier@ena.com

November 12, 2018

Kitty Ganier, Esq., General Counsel
ENA Education Networks of America
618 Grassmere Park Drive, Suite 12
Nashville, Tennessee 37211

Dear Ms. Ganier:

As you know, I am a professor of law at The University of Tennessee College of Law where I teach contract law courses, among other things, and research and write in that and related areas of law. My curriculum vitae is enclosed for your ease of reference. You have asked me to examine certain documents by, between, and regarding the ENA Education Networks of America/ENA Services, LLC (collectively, "ENA"), the Tennessee E-rate Consortium ("Consortium") and the Consortium's lead member the Metro-Nashville Public Schools ("MNPS"), and determine whether the addition of 43 school districts (the "Applicants") to the Consortium modified the existing contract for E-rate supported services between MNPS and ENA (the "Master Contract"). That opinion is below. In rendering this opinion, I have assumed that the entities involved are duly organized and in good standing, that all signatures are genuine, and that the documents that you supplied me with are authentic and complete. In rendering this opinion, I am acting as an individual and not as a representative or agent of The University of Tennessee.

The opinion is rendered solely to you and for your benefit and may not be relied upon by any other entity except your successors and assigns without my prior written consent. You are authorized to provide this opinion to the Federal Communications Commission in any matter relating to this contract.

SUMMARY OF OPINION

The addition of the Applicants to the Consortium did not modify or affect the Master Contract between MNPS and ENA. Under both federal regulations and Tennessee law, the Applicants may purchase E-rate services from the Master Contract, but they do not become a party to or modify the Master Contract. 47 C.F.R. 54.500, 54.501; *In the Matter of Request for Review of Decision of the Universal Service Administrator by Paterson School District*, 21 FCC Rcd. 13101, 13102, para. 3 (November 2, 2006) (*Paterson*); Tenn. Code Ann. § 12-3-1203(c)(1). Although Master Contract "establishes terms of service, it is not itself a mutually binding agreement between the provider and the applicant seeking the services." *Paterson* at para 3. Moreover, the Applicants taking services from the Master Contract were not required to satisfy competitive bidding requirements because the Master Contract had been competitively bid. *In*

the Matter of Request for Review of a Decision of the Universal Service Administrator by Coahoma County School District, 120126 FCC Rcd. 11201, 11203, para. 4 (August 8, 2011); Tenn. Code Ann. § 12-3-1203(c)(1).

FACTS

On February 4, 2011, MNPS posted Form 470 534070000900066 and a Request for Proposal (RFP) in accordance with E-rate program rules. *See* 47 C.F.R. § 54.503. Following the 28-day competitive bidding period, a five-year contract for services was awarded to ENA. This Master Contract was entered into by MNPS and ENA on March 7, 2011, and effective from effective July 1, 2011 through June 30, 2016. The Applicants joined the Consortium in the fall of 2011, and sought to purchase E-rate services from and under the terms of the Master Contract and submitted individual FCC Forms 471 for funding year 2012. Funding was denied to the Applicants on apparent concerns that the initial procurement should have listed every potential school district that might take services. The Consortium filed a request for waiver of any applicable Commission or E-rate Program rules on February 11, 2013, as supplemented on December 17, 2013.

DISCUSSION

I. Under Federal Law, the Addition of the Applicants to the Consortium did not modify the Master Contract between MNPS and ENA and does not Require Competitive Bidding

A “master contract” is a contract negotiated with a service provider by a third party, the terms and conditions of which are then made available to an eligible school, library, rural health care provider, or consortium that purchases directly from the service provider. 47 C.F.R. 54.500.

Under federal regulations and E-rate rules, competitive bidding is not required if the original contract is not modified or where the modification is minor. *In the Matter of Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration*, 13 FCC Rcd. 237213, FCC Rcd. 5318, 5548, paras. 223-224 (December 30, 1997). A modification is a change to a universal services contract, and a “minor contract modification” is a change to a universal service contract that is within the scope of the original contract and has no effect or merely a negligible effect on price, quantity, quality, or delivery under the original contract.” 47 C.F.R. 54.500.

Moreover, eligible recipients, such as the Applicants, may purchase services from master contracts without going through competitive bidding. Specifically: “Applicants may purchase eligible services from ‘master contracts’ negotiated by a third party such as a governmental entity. The third party initiating the master contract must comply with the Commission’s competitive bidding requirements and state procurement laws. The applicant is not required to satisfy the competitive bidding requirements if it takes service from a master contract that either has been competitively bid or qualifies for the existing contract exemption.” *In the Matter of Request for Review of a Decision of the Universal Service Administrator by Coahoma County School District*, 26 FCC Rcd. 11201, 11203, para 4 (August 8, 2011); *In the Matter of Requests for Review of Decisions of the Universal Service Administrator by Allendale County School*

District, 26 FCC Rcd. 6109, 6111, para. 5 (April 21, 2011) (same); *In the Matter of Requests for Review of Decisions of the Universal Service Administrator by Pasadena Unified School District*, 21 FCC Rcd. 2116, 2117, para 4 (February 28, 2006) (same); see also *In the Matter of Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration*, 13 FCC Rcd. 237213, FCC Rcd. 5318, 5552, para. 232 (December 30, 1997).

In these circumstances, the master contract is not modified and remains unchanged; it “establishes terms of service, it is not itself a mutually binding agreement between the provider and the applicant seeking the services.” *In the Matter of Request for Review of Decision of the Universal Service Administrator by Paterson School District*, 21 FCC Rcd. 13101, 13102, para. 3 (November 2, 2006); 47 C.F.R. 54.500. Accordingly, for this reason as well, competitive bidding is not required when applicants purchases services from a master services contract – because that master contract has already been competitively bid. *In the Matter of Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration*, 13 FCC Rcd. 237213, FCC Rcd. 5318, 5548, paras. 223-224 (December 30, 1997).

The rationale for allowing applicants to purchase services from master contracts without going through competitive bidding was set out in *In the Matter of Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration*, 13 FCC Rcd. 237213, FCC Rcd. 5318, 5548, paras. 232 (December 30, 1997):

We find that eligible schools, libraries, and rural health care providers seeking discounted services or reduced rates should be allowed to purchase services from a master contract negotiated by a third party. In the Order, the Commission found that the competitive bid requirement would minimize the universal service support required by ensuring that schools, libraries, and rural health care providers are aware of cost-effective alternatives. The Commission concluded that, like the language of section 254(h)(1) that targets support to public and nonprofit rural health care providers, this approach “ensures that the universal service fund is used wisely and efficiently.” Insofar as an independent third party negotiating a master contract may be able to secure lower rates than an eligible entity negotiating on its own behalf, we conclude that allowing schools, libraries, and rural health care providers to order eligible telecommunications services from a master contract negotiated by a third party is consistent with our goal of minimizing universal service costs and therefore is also consistent with section 254(h)(1).

Here, the Master Contract qualified as a master contract under 47 C.F.R. 54.500 because at all relevant times it was negotiated by and entered into by a third party – MNPS as the lead member of the Consortium. The Applicants were and remain strangers to the Master Contract, but were expressly and specifically entitled to purchase services from the Master Contract under its terms without modifying the Master Contract and without competitive bidding. *In the Matter of Request for Review of a Decision of the Universal Service Administrator by Coahoma County School District*, 26 FCC Rcd. 11201, 11203, para 4 (August 8, 2011); *In the Matter of Requests for Review of Decisions of the Universal Service Administrator by Allendale County School District*, 26 FCC Rcd. 6109, 6111, para. 5 (April 21, 2011) (same); *In the Matter of Requests for Review of Decisions of the Universal Service Administrator by Pasadena Unified School District*, 21 FCC Rcd. 2116, 2117, para 4 (February 28, 2006) (same); see also *In the Matter of*

Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration, 13 FCC Rcd. 237213, FCC Rcd. 5318, 5552, para. 232 (December 30, 1997); *In the Matter of Request for Review of Decision of the Universal Service Administrator by Paterson School District*, 21 FCC Rcd. 13101, 13102, para. 3 (November 2, 2006).

II. Under Tennessee Law, the Addition of the Applicants to the Consortium did not modify the Master Contract between MNPS and ENA and does not Require Competitive Bidding

Under Tennessee Law a modification to a contract requires “a change to one or more contract terms” *Simpson v. Nat’l Fitness Ctr., Inc.*, 2017 No. E2017-00018-COA-R3-CV, Tenn. App. LEXIS 624, *28 (September 18, 2017).

Tennessee Code Annotated § 12-3-1203(c) (“§ 12-3-1203(c)”) makes any local governmental unit of Tennessee, including school districts, the *statutory* beneficiary of a contract for goods or services entered into by another Tennessee local governmental unit, and exempts the beneficiary school district from competitive bidding. *See* Tenn. Op. Atty. Gen. No. 15-31, 2015 Tenn. AG LEXIS 31 (Tenn. A.G. 2015); *see also City of Humboldt v. McKnight*, No. M2002-02639-COA-R3-CV, 2005 Tenn. App. LEXIS 540 *80, n. 22 (Tenn. Ct. App. 2005) (citing Tenn. Code Ann. § 29-20-102(3)(A) (school districts are local governmental entities or units)). Under § 12-3-1203(c), the beneficiary school district may purchase services under the same terms as the original contract.

Section 12-3-1203(c)(1) states:

(c)(1) Any municipality, county, utility district, or other local governmental unit of this state may purchase supplies, goods, equipment, and services¹ under contracts or price agreements entered into by any other local governmental unit of this state. Such purchases shall be made on the same terms and under the same rules and regulations as regular purchases of the purchasing entity. Any local governmental unit that purchases supplies, goods, equipment, or services under this section shall directly handle payment, refunds, returns, and any other communication or requirements involved in the purchase without involving the local governmental unit that originated the contract. The originating local governmental unit shall have no liability or responsibility for any purchases made by another local governmental unit under a contract that the originating local governmental unit negotiated and consummated. Where any local or private act, charter, or general law requires that a local governmental unit purchase by competitive bidding, the local governmental unit may, notwithstanding the local or private act, charter, or general law, purchase without public advertisement or competitive bidding in accordance with this section.

(Emphasis added).

¹ New motor vehicles except special purpose vehicles such as school buses and ambulances and purchases related to transportation infrastructure projects are excluded. Tenn. Code Ann. §§ 12-3-1203(c)(2), 12-3-1208.

This practice is sometimes referred to as “piggybacking.” See, e.g., *Legal Authority for Cooperative Purchasing*, The University of Tennessee County Technical Assistance Service, <http://eli.ctas.tennessee.edu/reference/legal-authority-cooperative-purchasing> (Section 12-3-1203 “authorizes in-state ‘piggyback’ contracts whereby cities, counties, utility districts, and other local governments in Tennessee may purchase supplies, goods, equipment, and services under the same terms as a legal bid initiated by any other city, county, utility district, or other local government unit in Tennessee.”) The practice is *statutory*, not contract-based, however. The “piggyback” school district does *not* become a party to contract entered into by the other local governmental unit, but is, instead, a statutory beneficiary or beneficiary by operation of statute.

Under § 12-3-1203(c)(1) the beneficiary local governmental unit and the contracting local governmental unit operate independently and are not in privity of contract. The statute specifically provides: “Any local governmental unit that purchases . . . services under this section shall directly handle payment, refunds, returns, and any other communication or requirements involved in the purchase without involving the local governmental unit that originated the contract.” Section 12-3-1203(c)(1) further states: “The originating local governmental unit shall have no liability or responsibility for any purchases made by another local governmental unit under a contract that the originating local governmental unit negotiated and consummated.”

Allowing beneficiary governmental units to make purchases from the original contract under § 12-3-1203(c)(1) does not modify the original contracts as no terms are changed. *Simpson v. Nat'l Fitness Ctr., Inc.*, 2017 No. E2017-00018-COA-R3-CV, Tenn. App. LEXIS 624, *28 (September 18, 2017). On the contrary, § 12-3-1203(c)(1) specifically provides: “Such purchases shall be made on the same terms and under the same rules and regulations as regular purchases of the purchasing entity.”


Here, the Applicants were made beneficiaries to the Master Contract by operation of statute – § 12-3-1203(c)(1), and were entitled to purchases services under the Master Contract without competitive bidding. *Id.* This practice does not make them parties to the Master Contract or modify the Master Contract. *Simpson v. Nat'l Fitness Ctr., Inc.*, 2017 No. E2017-00018-COA-R3-CV, Tenn. App. LEXIS 624, *28 (September 18, 2017).

CONCLUSION

Under both Federal and Tennessee Law, the addition of the applicants to the Consortium after the Master Contract was negotiated and entered into by MNPS and ENA did not modify the Master Contract. Competitive bidding of a contract in this case was contemplated and undertaken by the Consortium led by MNPS and the Master Contract did not disallow additional beneficiaries. Thus, there was not a modification of the Master Contract by the addition of the Applicants to the Consortium, and the Applicants were entitled to purchase services from the

Master Contracts without competitive bidding. This is not to say that under different facts or types of contracts this would be an amendment or modification that changed terms of the master contract. But, in my professional opinion, that is not the case here.

Very truly yours,



George W. Kuney

George W. Kuney

Center for Entrepreneurial Law
University of Tennessee College of Law
1505 West Cumberland Avenue, Suite 202
Knoxville, TN 37996
(865) 974-2500

LEGAL CAREER

Clayton Center for Entrepreneurial Law
University of Tennessee
College of Law
Knoxville, Tennessee

Lindsey Young Distinguished Professor of
Law, Director of the James L. Clayton
Center for Entrepreneurial Law, Director of
LL.M. in United States Business Law
December 2000 to present

Allen, Matkins, Leck, Gamble & Mallory
San Diego, California

Partner
September 1993 to December 2000

California Western School of Law
San Diego, California

Adjunct Professor, Bankruptcy, Legal Drafting
1997 to 2000

Howard, Rice, Nemerovski, Canady,
Robertson, Falk & Rabkin
San Francisco, California

Business Department, Associate
April 1992 to September 1993

University of California
Hastings College of the Law
San Francisco, California

Adjunct Instructor, Research & Writing
Program, Moot Court & Advocacy Program
1990 to 1993

Morrison & Foerster
San Francisco, California

Business Department, Associate
September 1989 to April 1992

EDUCATION

University of San Diego
San Diego, California

M.B.A., New Venture Management
Emphasis, 1997

University of California
Hastings College of the Law
San Francisco, California

J.D., *cum laude*, 1989
HASTINGS LAW JOURNAL, 1987-1988
COMM/ENT; Senior Note Editor
1988-1989
Milton T. Green Top Ten Award
Thurston Society

University of California
Santa Cruz, California

B.A., Economics, 1986, Honors in the Major

George W. Kuney

COURSES TAUGHT

Business Associations, Commercial Law, Contracts I, Contracts II, Contract Drafting, Commercial Leasing, Consumer Bankruptcy and Finance Seminar, Debtor-Creditor Law, Mergers & Acquisitions, Introduction to Business Transactions, Introduction to United States Business Law (LL.M.), Property, Remedies, Representing Enterprises, and Workouts & Reorganizations.

BOOKS AND TREATISES

Co-author, *Corporate Finance* (forthcoming Lexis 201__, with Joan Heminway).

Co-author, *Entrepreneurial Law* (forthcoming, West 2019, with Brian K. Krumm).

Co-author, *California Law of Contracts* (University of California CEB Treatise 2007-2018, with Donna C. Looper, updated annually).

Co-author, *Contracts: Transactions and Litigation* 4th ed. (West 2017, with Robert M. Lloyd).

Co-author, *Legal Drafting: Processes, Techniques, and Exercises* (West 2017, with Donna C. Looper).

Co-author, *A Transactional Matter* (West 2017, with Brian K. Krumm).

Co-author, *Legal Drafting in a Nutshell* 4th Ed. (West 2016, with Donna C. Looper).

Author, *Experiencing Remedies* (West 2015).

Co-author, *Bankruptcy in Practice* 5th Ed. (2015, with Michael Bernstein).

Author, *The Elements of Contract Drafting with Questions and Clauses for Consideration* 4th ed. (text and teacher's manual, West 2014).

Co-author, *A Civil Matter: A Guide to Civil Procedure and Litigation* (West 2013, with Donna C. Looper).

Author, *Judgment Collection in Tennessee* (Amazon/Center for Entrepreneurial Law 2013).

Co-author, *Business Reorganizations* 3d ed. (Lexis 2013, with Michael Gerber).

Co-author, *The Entrepreneurial Law Clinic Handbook* (West 2012, with Brian K. Krumm).

Author, *Bamboozled? Bowers v. Baystate and Its Aftermath* (West 2012).

Co-author, *Contracts: Transactions and Litigation* 3d ed. (text and teacher's manual, West 2011, with Robert M. Lloyd).

George W. Kuney

Co-author, *Mastering Appellate Process* (with Donna C. Looper, Carolina Academic Press 2011).

Co-author, *Mastering Legal Analysis and Drafting* (Carolina Academic Press 2009, with Donna C. Looper).

Co-author, *Sales, Negotiable Instruments, and Payment Systems: UCC Articles 2, 3, 4, 4A and 5* (text and teachers manual, Center for Entrepreneurial Law 2009, with Robert M. Lloyd).

Co-author, *Secured Transactions: UCC Article 9 and the Bankruptcy Code* (text and teacher's manual, Center for Entrepreneurial Law 2008, with Robert M. Lloyd).

Co-author, *Contracts: Transactions and Litigation* 2d ed. (text and teacher's manual, West 2008, with Robert M. Lloyd).

Co-Author, *Mastering Intellectual Property Law* (Carolina Academic Press 2008, with Donna C. Looper).

Author, *Mastering Bankruptcy* 2d ed. (Carolina Academic Press 2008).

Co-author, *Legal Drafting: Process, Techniques, and Exercises* (text and teacher's manual, West 2007, with Thomas Haggard).

Co-author, *Legal Drafting in a Nutshell*, 3d ed. (West 2007, with Thomas Haggard).

Author, *Norton Bankruptcy Practice and Proceedings, Chapters 28* (Meeting of Creditors—Section 341), *29* (Notice—Section 342), and *30* (Examination of Debtors—Sections 343/344) (West 2007).

Co-author, *Chapter 11-101: The Essentials of Chapter 11 Practice* (ABI 2007, with Jonathan Friedland, Michael Bernstein, and John Ayer.).

Author, *The Elements of Contract Drafting with Questions and Clauses for Consideration*, 2d ed. (text and teacher's manual, West 2007).

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George W. Kuney

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Kuney's Corner, *Cram Down: An Impaired Class of Claims Says "No" But the Plan is Confirmed Anyway*, Commercial Bankruptcy Litigation, (March 12, 2014).

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George W. Kuney

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Co-author, *Single Asset Real Estate Under 11 U.S.C. § 362(d)(3): A Narrower Construction Than You Might Expect*, 26 CAL. BANK. J. 130 (2002).

Intellectual Property Licenses in Bankruptcy, 16 CAL. BUS. L. PRACT. 33 (Spring 2001).

Qualified Settlement Funds: A Tool to Shelter Gains and Taxable Income with Payments on Account of Disputed Claims, 24 CAL. BANKR. J. 137 (1999).

George W. Kuney

Co-author, *The Allowed Secured Claim: Accounting for Payment of Net Rents*, 23 CAL. BANKR. J. 111 (1996).

11 U.S.C. Sections 1125(a) and 1145: Going Public Via Chapter 11, 23 CAL. BANKR. J. 3 (1996).

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Claims for Attorney's Fees Under the Bankruptcy Code, 4 J. BANKR. L. AND PRAC. 203 (1995).

Interest on Nothing?, 9 COMM. L. BULL. 30 (1994).

SPEAKING AND OTHER ENGAGEMENTS

"Drafting Elegant Contracts," Kingsport Bar Association, Kingsport, TN, May 8, 2018.

"Bankruptcy Meets Construction Law," ABA Section on Construction Law Spring Meeting/Forum, New Orleans, LA, April 12, 2018.

"Drafting Elegant Contracts," Texas Bar Association, Section on Entertainment Law, Austin, TX, November 17, 2017.

"Transactional Drafting," Jones Day LLP, Washington D.C., New York, NY, Atlanta, GA, March 14, 2007, December 9, 2015, November 8, 2017.

"Teaching Using the Case Study/Report Approach," Legal Writing Institute Annual Conference, Knoxville, Tennessee, April 18, 2015.

"Risk Management: A Conversation," and "Risk Management: Continuing the Conversation," Scripps Interactive Network, Knoxville, Tennessee, November 2014 & January 2015.

"Capstone Courses," American Association of Law Schools Conference, New Orleans, La., January 5, 2013.

"The Winds of Change in Civil Law Practice," Miller & Martin, Chattanooga, TN, September 20, 2013.

"Transactional Drafting," Miller & Martin, Chattanooga, TN, July 29, 2010.

"Ethical Issues" and "363 Sales," Norton Bankruptcy Institute, Las Vegas, Nevada, March 26, 2010.

George W. Kuney

“Morality and Contract Law,” Spring Conference on Contracts, UNLV, Las Vegas, Nevada, February 27, 2010.

“The Present and Future of ‘One Size Fits All’: Do We Need a Chapter for Those ‘Too Big to Fail’”, American Bankruptcy Institute 2009 Legislative Symposium, Chapter 11 at the Crossroads, Does Reorganization Need Reform? A Symposium on the Past, Present, and Future of U.S. Corporate Restructuring, Georgetown University Law Center, Washington, D.C., November 16-17, 2009.

“Transactional Drafting Workshop: Venture Capital,” DLA Piper, Palo Alto, CA, July 22-23, 2008.

“Papering the Deal: Writing for Transactional Attorneys,” The New Lawyer Experience: Bridging the Gap Between Preparation and Practice, Tennessee Bar Association, Knoxville, Tennessee, February 15, 2008.

Amicus counsel in support of the plaintiff/appellant in *Shultz v. United States*, 369 B.R. 349 (E.D.Tn. 2007) and *Shultz v. United States*, 529 F.3d 343 (6th Cir 2008) (challenge to constitutionality of Bankruptcy Code’s “means test”).

Pro se appellant in *Kuney v. Bean*, 2008 U.S. App. Lexis 14686 (Fed. Cir 2008) (dissolving lower court protective order on grounds of over breadth to allow access to sealed documents for research purposes).

Member, Steering Committee, Contract Drafting Conference, Emory University Transactional Practice Center, May 2-3, 2008.

“Transactional Drafting,” Jones Day, Cleveland, OH, October 19, 2007; Chicago, IL, November 2, 2007; Dallas, TX, November 9, 2007.

“Advanced Contract Drafting,” DLA Piper US LLP, Chicago, IL, August 13, 2007.

“Drafting Concrete Contracts & Writing Better Brief,” Tennessee Bar Association Young Lawyers Division, Knoxville, TN, July 11, 2007.

“Transactional Drafting Workshop,” Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Nashville, TN, March 1, 2007.

“Recent Developments in State Law Issues Affecting Commercial Transactions that Every Bankruptcy Lawyer Ought to Know,” Mid-South Commercial Law Institute, Nashville, TN, November 16, 2006.

“Bankruptcy Proofing Techniques: Substantive Consolidation Opinions and Bankruptcy Remote Entities,” Mid-South Commercial Law Institute, Nashville, TN, November 17, 2006.

“Contract Law and Teaching: Transactions and Litigation,” panelist, SEALS, July 21, 2006.

George W. Kuney

Author and Publisher of "Living Off Campus: A Quick Guide to Town Living for University of Tennessee Students" (1st Edition 2005, 2nd Edition 2006).

"The Nuts and Bolts of Contract Drafting," workshop speaker and "Drafting Rules, Adding Value to the Deal, and Ethical Issues in Contract Drafting," speaker, Teaching Contract Drafting, Northwestern University School of Law, July 20-21, 2005.

"Transactional Training Clinic: Simulation of \$50,000,000 Asset Acquisition and \$40,000,000 Senior Secured Term Loan," lead instructor, Sheppard, Mullen, Richter & Hampton LLP, June 8-22, 2005.

"Putting 'Business' Back Into the Education of Business Lawyers," panelist, American Bar Association, Business Law Section Spring meeting, Nashville, TN, March 31, 2005.

"U.S.C. Section 363(f): What Can You Sell Free and Clear Of?," panelist, American Bar Association, Business Law Section Spring meeting, Nashville, TN, March 31, 2005.

"Collaboration," panelist, Pedagogy to Practice: Maximizing Legal Education with Technology Conference, American Bar Association, Newark, NJ, October 15, 2005.

"Ethical Considerations in the Formation and Representation of Entities," Partnerships, LLCs and LLPs: Organization and Operation in Tennessee, October 8, 2005.

"Teaching Contract Drafting: The Whereases and Wherefores," Legal Writing Institute, annual conference, Seattle, WA, July 23, 2004.

"The Intersection of Law and Business," panelist, Southeastern Association of Law Schools Annual Meeting, August 1, 2004.

"Ethical Considerations in the Formation and Representation of Entities," panelist, Partnerships, LLCs and LLPs: Organization and Operation in Tennessee, Knoxville, TN, October 9, 2003.

"Bankruptcy and the Tort Lawyer: What You Need to Know," Damages in Tort Law Symposium speaker, University of Tennessee College of Law, Knoxville, TN, April 3, 2003.

"Contract Drafting: Fundamentals, Plain English & Papering the Deal," sole instructor, United States Department of Energy BWXT Y-12, LLC, December 4, 2002.

"Teaching Entrepreneurship," panelist, Southeastern Conference AALS Annual Meeting, July-August 2002.

"Combining Academic and Practical Training Through an Entrepreneurship Program," Co-Lead Panelist, Kaufman Center for Entrepreneurial Leadership, April 2002.

"Legal Issues, Problems and Guidelines for Small Businesses: What You Don't Know Can Hurt You!," coordinator and designer of curriculum and visual aids, co-sponsored by the Knoxville Bar Association, Clayton Center for Entrepreneurial Law, the Pellissippi State Small Business

George W. Kuney

Development Center, and the Knoxville Area Chamber Partnership, Knoxville, TN, October 2001 and March 2002.

“Doing Business on the Internet,” panelist, sponsored by the Business Law Section of the State Bar of California, June 1998.

“Attorney vs. Client: Working Toward Better Client Relations,” panelist, sponsored by the Business Law Section of the State Bar of California, June 1996.

SELECTED AFFILIATIONS AND AWARDS

Nominee, Tina L. Stark Award for Excellence in the Teaching of Transactional Law and Skills, Emory Conference on Transactional Law and Skills, June 1, 2018.

Faculty Advisor to *Transactions: The Tennessee Journal of Business Law* (2000 – present).

Chancellor’s Excellence in Graduate Mentoring and Advising Award (2017).

Carden Award for Outstanding Achievement in Scholarship (2007, 2016).

Harold C. Warner Outstanding Teacher Award (2005).

Carden Award for Outstanding Service to the Institution (2004, 2010).

W. Allen Separk Faculty Scholarship Award (2003)

Research Fellow, Center for Corporate Governance, University of Tennessee.

American Bar Association, Member.

American Bankruptcy Institute, Member.

California Bankruptcy Forum; CALIFORNIA BANKRUPTCY JOURNAL, Editor Emeritus, Editor in Chief (1999-2003), Managing Editor (1997-1998), Contributing Editor (1996).

Admitted to the bar and state and federal courts of California and Tennessee and the Federal District Court for the District of Arizona, the Federal Court of Appeals, Sixth and Ninth Circuits, as well as the Supreme Court of the United States.

EXHIBIT 2

REQUEST FOR PROPOSAL

NUMBER 11-4

METROPOLITAN NASHVILLE PUBLIC SCHOOLS
On behalf of
THE METROPOLITAN NASHVILLE BOARD OF PUBLIC
EDUCATION

This solicitation document serves as the written determination of the Director of Purchasing, that the use of competitive sealed bidding is neither practicable nor advantageous to the Metropolitan Nashville Public Schools (MNPS). Therefore, this solicitation will facilitate the entering into of contract(s) by the competitive sealed proposals process.

RFP Title:
Managed Internet Access, Voice-Over-IP and Video Conferencing



Purchasing Staff Contact:
Richard Zambetti(615) 259-8541
Richard.Zambetti@MNPS.org
February 4, 2011

This proposal solicitation document is prepared in a Microsoft Word (Office for Windows) format. Any alterations to this document made by the proposer may be grounds for rejection of proposal, cancellation of any subsequent award, or any other legal remedies available to the Metropolitan Nashville Public Schools (MNPS).

**Request for Proposals
RFP Title:**

Managed Internet Access, Voice-Over-IP and Video Conferencing
--

**All Submitted Proposals become Public Record after Award.
Submission of a Proposal is an official waiver of confidentiality, not withstanding
any statements to the contrary that may be contained within the Proposal.**

1) Introduction/Overview

A. Overview

The Metropolitan Nashville Public Schools (MNPS) is requesting proposals on behalf of MNPS and the Tennessee E-Rate Consortium (Consortium) whose members have furnished a Letter of Agency (LOA) to MNPS for the purpose of securing services.

These services are intended to be eligible for the Federal Communications Commission's (FCC) Universal Service Program for Schools and Libraries known commonly as E-Rate. The method for all of the K-12 public school districts of Tennessee to purchase from this contract is TCA Title 12, Chapter 3, Part 10, which effectively allows Local Education Agencies, hereafter referred to as LEA, to make purchases based on the terms of a contract signed by another LEA. The funding for this contract comes from both LEA funds and the Federal E-Rate program. The technical and functional requirements for providing the necessary bundled, Internet access and management of the overall service offering must be flexible, scalable, and creatively approached by the proposing service provider. E-Rate Funding for the public schools will continue to be an overriding factor in determining what kind of technology and service offerings can be deployed throughout the Consortium's public school system environment.

B. Purpose

The MNPS is requesting sealed proposals from qualified firms for the purchase of the following products and services:

- 1) Managed Internet Access as defined in the E-Rate program's Eligible Services List (ESL) as Priority 1(On-Premise Priority One Equipment) services.
 - a. Option for CIPA compliant content filtering
 - b. Option for E-Mail Hosting
 - c. Option for Web Hosting
- 2) Managed Voice-Over-IP (VOIP) services as defined in the E-Rate program's Eligible Services List (ESL) as Priority 1 service.
- 3) Managed Video Conferencing services as defined in the E-Rate program's Eligible Services List (ESL) as Priority 1 service.

EXHIBIT 3

**CONTRACT BETWEEN
METROPOLITAN NASHVILLE PUBLIC SCHOOLS ON BEHALF OF THE
METROPOLITAN BOARD OF PUBLIC EDUCATION
AND
ENA SERVICES, LLC
FOR PURCHASE OF GOODS AND SERVICES**

This contract is entered into on this 7th day of March, 2011, by and between **METROPOLITAN NASHVILLE PUBLIC SCHOOLS ("MNPS") ON BEHALF OF THE METROPOLITAN BOARD OF PUBLIC EDUCATION ("MBPE")** and ENA Services, LLC, 1101 McGavock Street, 3rd Floor, Nashville, TN 37203 ("Contractor"). This contract consists of the following documents:

- a) This contract,
- b) Managed Internet Access, Voice-Over-IP and Video Conferencing, RFP 11-4
- c) Amendment One (1), 2-15-11, Amendment Two (2) 2-15-11, Amendment Three (3) 2-21-11
- d) Contractor's Bid/Proposal dated March 4, 2011

In the event of conflicting provisions, all documents shall be construed according to the following priorities:

- a) any properly executed amendment or change order to this contract, (most recent with first priority),
- b) this contract,
- c) Contractor's Bid/Proposal dated March 4, 2011,
- d) Managed Internet Access, Voice-Over-IP and Video Conferencing, RFP 11-4

- 1. Duties and Responsibilities of Contractor.** Contractor agrees to provide and MNPS agrees to purchase the following goods and services:

As describe in RFP 11-4 and detailed in vendor's response to RFP 11-4.

Performance Bond

MNPS shall require a performance bond upon approval of a contract pursuant to this RFP. The amount of the performance bond shall be a sum equal to Ten Million Dollars (\$10,000,000.00), and said amount shall be reduced as detailed in the chart below:

\$10,000,000.00 Year one of contract

\$8,000,000.00 Year two of contract
\$6,000,000.00 Year three of contract
\$4,000,000.00 Year four of contract
\$2,000,000.00 Year five of contract

This bond may be reduced or the requirement waived at anytime during the life of this contract with the agreement of both parties.

The successful Proposer must obtain the required performance bond in form and substance acceptable to MNPS and provide it to MNPS no later than The start of the contract

The successful Proposer must meet this performance bond requirement by providing the MNPS either:

- a. a performance bond that covers the entire Contract period including all options to extend the Contract, or
- b. a performance bond for the first, twelve (12) calendar months of the Contract in the amount detailed above, and, thereafter, a new or re-issued performance bond in the amount detailed above covering each subsequent twelve (12) calendar month period of the Contract. (In which case, the Contractor must provide the new (or re-issued) performance bonds to the MNPS no later than thirty (30) days preceding each subsequent period of the Contract to be covered by the new (or re-issued) bond.)

Failure to provide to MNPS a performance bond as required by performance bond deadline detailed in the Contract, as applicable in the case of a periodic new (or re-issued) performance bond, no later than thirty (30) days preceding each period of the Contract to be covered by the new or re-issued bond, shall result in contract termination.

The successful Proposer must make all necessary arrangements for the performance bond prior to the Contract start date and prior to any subsequent performance bond deadlines in the case of an annual performance bond. MNPS will not assist the Proposer with securing the services of any fidelity or guaranty underwriter.

Failure to adhere to these requirements shall result in termination of the Contract as a material breach of the contract. Further, as applicable, failure to periodically provide to the MNPS a new or re-issued performance bond subsequent to the first as required above shall be a material breach of contract and result in MNPS taking action to exact payment pursuant to the current performance bond held by MNPS as per paragraph 10. **Termination Breach** to this contract.

2. Delivery and Installation.

- a) All deliveries shall be made pursuant to a written purchase order issued by Metropolitan Nashville Public Schools, which assumes no liability for any goods delivered without such purchase order. All deliveries shall be made to indicated location within ninety (90) days of the issuance of a purchase order. Installation of ENA Connect Voice Services performed by ENA shall be completed within one hundred eighty (180) days of the date of service request provided that MNPS has completed site preparations, including LAN readiness and availability of Ethernet connection points at all telephone locations, by the date of service requested.
- b) Installation is required. Installation of Managed Internet Services shall be completed within one hundred eighty 180 days of the date of delivery.

3. Term. The term of this contract will begin July 1, 2011 and end June 30, 2016.

4. **Compensation.** Compensation will be paid upon installation of internet and video conferencing services installed based on the pricing schedule identified in ENA 's price list identified in the RFP response on Pages 100-115. The billing will be paid monthly upon receipt of invoice. In no event shall the total compensation for this contract exceed \$ \$11,500,000 for the contract term.

There will be no other charges for the performance of this contract.

MNPS will make reasonable efforts to make payments within 30 days of receipt of invoice but in any event shall make payments within 60 days. MNPS will make reasonable efforts to make payments to small businesses within 15 days of receipt of invoice but in any event shall make payment within 60 days.

Contractor shall submit a written report with invoice to MNPS each month setting forth the services provided in the billing period. Such report shall include, but not limited to, description of type of service, date, time and duration of service, agendas, sign-in sheets, attendance rosters. Payment of invoices may be withheld if documentation is not sufficient. MNPS may request additional documentation or explanation regarding services at any time and Contractor shall respond to such requests promptly with such additional information as MNPS may require. Failure to provide such additional information or explain why it cannot be provided within thirty days of receipt of the request from MNPS may be cause for termination of this contract.

5. **Contractor Performance Evaluation.**

The reports of service rendered under this contract as provided by the contractor and agreed to in substance by MNPS will be reviewed at a minimum of quarterly during the term of the contract and reports filed for review and consideration by senior management of MNPS.

Reports will cover all SLAs listed in the RFP and responded to by the contractor.

6. **Taxes.** MNPS shall not be responsible for any taxes that are imposed on Contractor other than sales/use taxes stated above. Furthermore, Contractor understands that it cannot claim exemption from taxes by virtue of any exemption that is provided to MNPS.

7. **Warranty.**

- a) Contractor warrants that for a period of one year from the date of delivery, the goods provided, including software, shall be free of any defects that interfere with or prohibit the use of the goods for the purposes for which they were obtained. Such purposes are stated in the RFP.
- b) During the warranty period, MNPS may, at its option, request that Contractor repair or replace any defective goods, by written notice to Contractor. .

8. **License.** Contractor warrants and represents that it is the owner of or otherwise has the right to and does hereby grant MNPS a license to use any software provided for

the purposes for which the software was obtained. Such purposes are set forth in MNPS' RFP.

9. Copyright, Trademark, Service Mark, or Patent Infringement.

- a) Contractor shall, at its own expense, be entitled to and shall have the duty to defend any suit which may be brought against MNPS to the extent that it is based on a claim that the products or services furnished infringe a copyright, Trademark, Service Mark, or patent. Contractor shall further indemnify and hold harmless MNPS against any award of damages and costs made against MNPS by a final judgment of a court of last resort in any such suit. MNPS shall provide Contractor immediate notice in writing of the existence of such claim and full right and opportunity to conduct the defense thereof, together with all available information and reasonable cooperation, assistance and authority to enable Contractor to do so. No costs or expenses shall be incurred for the account of Contractor without its written consent. MNPS reserves the right to participate in the defense of any such action. Contractor shall have the right to enter into negotiations for and the right to effect settlement or compromise of any such action, but no such settlement or compromise shall be binding upon MNPS unless approved by the Metro Department of Law Settlement Committee and, where required, the Metro Council.
- b) If the products or services furnished under this contract are likely to, or do become, the subject of such a claim of infringement, then without diminishing Contractor's obligation to satisfy the final award, Contractor may at its option and expense:
 - i) *Procure for MNPS the right to continue using the products or services.*
 - ii) *Replace or modify the alleged infringing products or services with other equally suitable products or services that are satisfactory to MNPS, so that they become non-infringing.*
 - iii) *Remove the products or discontinue the services and cancel any future charges pertaining thereto.*
 - iv) *Provided, however, that Contractor will not exercise option b.iii. until Contractor and MNPS have determined that options b.i. and b.ii. are impractical.*
- c) Contractor shall have no liability to MNPS, however, if any such infringement or claim thereof is based upon or arises out of:
 - i) *The use of the products or services in combination with apparatus or devices not supplied or else approved by Contractor.*
 - ii) *The use of the products or services in a manner for which the products or services were neither designated nor contemplated.*
 - iii) *The claimed infringement in which MNPS has any direct or indirect interest by license or otherwise, separate from that granted herein.*

- 10. Termination--Breach.** Should Contractor fail to fulfill in a timely and proper manner its obligations under this contract or if it should violate any of the terms of this contract, MNPS shall have the right upon 7 days written notification to terminate the contract. The performance Bond listed in Section One (1), Duties and Responsibilities of Contractor will be surrendered in the an amount equal to the dollar amount listed in the schedule of Section One (1) or as may be amended during the term of the contract.
- 11. Termination--Funding.** Should funding for this contract be discontinued, MNPS shall have the right to terminate the contract immediately upon written notice to Contractor. Contractor shall be paid in full for all cost incurred to date and forth coming for equipment that is in process or that cannot be terminated without cost.
- 12. Termination--Notice.** MNPS may terminate this contract at any time upon thirty (30) days written notice to Contractor. Contractor shall be paid in full for all cost incurred to date and forth coming for equipment that is in process or that cannot be terminated without cost.
- 13. Compliance with Laws.** Contractor agrees to comply with any applicable federal, state and local laws and regulations.
- 14. Federal Economic Stimulus Funding.** If this Contract requires the Contractor to provide products and/or services that are funded in whole or in part under the American Recovery and Reinvestment Act of 2009, Public Law 111-5, (Recovery Act), then Contractor is responsible for ensuring that all applicable requirements, including but not limited to those set forth herein, of the Recovery Act are met and that the Contractor provides information to the State as required. The Contractor (and any subcontractor) shall comply with the following:

 - a) Federal Grant Award Documents, as applicable.
 - b) Executive Office of the President, Office of Management and Budget (OMB) Guidelines as posted at www.whitehouse.gov/omb/recovery_default/, as well as OMB Circulars, including but not limited to A-102 and A-133 as posted at: www.whitehouse.gov/omb/financial_offm_circulars/.
 - c) Office of Tennessee Recovery Act Management Directives (posted on the Internet at www.tnrecovery.gov).
 - d) The Recovery Act, including but not limited to the following sections of that Act:
 - i) Section 1604 – Disallowable Use. No funds pursuant to this Contract may be used for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.
 - ii) Section 1512 – Reporting and Registration Requirements. The Contractor must report on use of Recovery Act funds provided through this Contract. Information from these reports will be made available to the public.

- iii) Section 1553 – Recovery Act Whistleblower Protections. An employee of any non-Federal employer receiving covered funds under the Recovery Act may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to the Accountability and Transparency Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or other person working for the employer who has the authority to investigate, discover or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee believes is evidence of one or more of the following related to the implementation or use of covered funds:
- (1) gross mismanagement,
 - (2) gross waste,
 - (3) substantial and specific danger to public health or safety,
 - (4) abuse of authority, or
 - (5) violation of law, rule, or regulation (including those pertaining to the competition for or negotiation of a Contract).

Non-enforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration: Except as provided in a collective bargaining agreement, the rights and remedies provided to aggrieved employees by this section may not be waived by any agreement, policy, form, or condition of employment, including any pre-dispute arbitration agreement. No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of a dispute arising out of this section.

Requirement to Post Notice of Rights and Remedies: The Contractor and any subcontractor shall post notice of the rights and remedies as required under Section 1553. (Refer to Section 1553 of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 located at www.recovery.gov, for specific requirements of this section and prescribed language for the notices.)

- iv) Section 902 – Access Of Government Accountability Office. The Contractor shall provide that the Comptroller General and his representatives are authorized:
- (1) to examine any records of the Contractor or any of its subcontractors, that directly pertain to, and involve transactions relating to, this Contract or a subcontract; and
 - (2) to interview any officer or employee of the Contractor or any of its subcontractors regarding such transactions.

- v) Section 1514 – Inspector General Reviews. Any inspector general of a federal department or executive agency has the authority to review, as appropriate, any concerns raised by the public about specific investments using such funds made available in the Recovery Act. In addition, the findings of such reviews, along with any audits conducted by any inspector general of funds made available in the Recovery Act, shall be posted on the inspector general's website and linked to the website established by Recovery Act Section 1526, except that portions of reports may be redacted to the extent the portions would disclose information that is protected from public disclosure under sections 552 and 552a of title 5, United States Code.
- vi) Section 1515 – Access of Offices of Inspector General to Certain Records and Employers. With respect to this Contract, any representative of an appropriate inspector general appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), is authorized:
 - (1) to examine any records, of the Contractor or any of its subcontractors, that pertain to and involve transactions relating or pursuant to this Contract; and
 - (2) to interview any officer or employee of the Contractor or any subcontractors regarding such transactions.
- vii) Section 1606 – Wage Rate Requirements. All laborers and mechanics employed by pursuant to this Contract shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code. All rulings and interpretations of the Davis-Bacon Act and related acts contained in 29 CFR 1, 3, and 5 are herein incorporated by reference.

For purposes of this Contract, laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term laborer or mechanic includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards.
- viii) Section 1605 – Buy American Requirements for Construction Material – Buy American, Use of American Iron, Steel, and Manufactured Goods. None of the funds provided by this Contract may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

- e) The Contractor agrees to comply with any modifications or additional requirements that may be imposed by law and future guidance and clarifications of Recovery Act requirements.
- f) If the Contractor enters into one or more subcontracts for any of the services performed under this Contract, each subcontract shall contain provisions specifically imposing on the subcontractor all requirements set forth in this Contract Section 14, "Federal Economic Stimulus Funding."

15. Notices.

Notice of assignment of any rights to money due to Contractor under this contract must be mailed or hand delivered to the attention of the Chief Accountant, ACCOUNTING DEPARTMENT, BUSINESS OFFICE, METROPOLITAN BOARD OF PUBLIC EDUCATION, 2601 BRANSFORD AVENUE, NASHVILLE, TN 37204, with a copy to the recipient for MNPS notices listed below:

- a) All other notices to MBPE shall be mailed or hand delivered to:

Dept: Information Technology
Attn: Tom Bayersdorfer
Addr: 2601 Bransford Avenue, Nashville, TN 37204

Phone: (615)259-8502
Email Addr: tom.bayersdorfer@mnps.org

- b) Notices to Contractor shall be sent to:

Contractor: ENA Services, LLC
Attn: Rex Miller, CFO
Addr: 1101 McGavock Street, 3rd Floor
Nashville, TN 37203

Phone: (615) 312-6005
E-mail Addr: rmiller@ena.com

- c) Contractor designates the following as the Contractor's agent for service of process and will waive any objection to service of process if process is served upon this agent:

Designated Agent:	(name)	John Gillmor, Esq
	(address)	1600 Division Street, Suite 700
		PO Box 340025
		Nashville, TN 37203
	(phone)	(615) 252-2305

Email Addr: jgillmor@babco.com

16. **Maintenance of Records.** Contractor shall maintain documentation for all charges against MNPS. The books, records, and documents of Contractor, insofar as they relate to work performed or money received under the contract, shall be maintained for a period of three (3) full years from the date of final payment and will be subject to audit, at any reasonable time and upon reasonable notice by MNPS or its duly appointed representatives. The records shall be maintained in accordance with generally accepted accounting principles.
17. **MNPS Property.** Any MNPS property, including but not limited to books, records and equipment, that is in Contractor's possession shall be maintained by Contractor in good condition and repair, and shall be returned to MNPS by Contractor upon termination of the contract. All goods, documents, records, and other work product and property produced during the performance of this contract are deemed to be MNPS property.
18. **Modification of Contract.** This contract may be modified only by written amendment executed by all parties and their signatories hereto. All change orders, where required, shall be executed in conformance with section 4.24.020 of the Metropolitan Code of Laws.
19. **Partnership/Joint Venture.** Nothing herein shall in any way be construed or intended to create a partnership or joint venture between the parties or to create the relationship of principal and agent between or among any of the parties. None of the parties hereto shall hold itself out in a manner contrary to the terms of this paragraph. No party shall become liable for any representation, act or omission of any other party contrary to the terms of this paragraph.
20. **Waiver.** No waiver of any provision of this contract shall affect the right of any party thereafter to enforce such provision or to exercise any right or remedy available to it in the event of any other default.
21. **Employment.** Contractor shall not subscribe to any personnel policy which permits or allows for the promotion, demotion, employment, dismissal or laying off of any individual due to race, creed, color, national origin, age, sex, or which is in violation of applicable laws concerning the employment of individuals with disabilities.
22. **Non-Discrimination.** It is the policy of the Metropolitan Government not to discriminate on the basis of age, race, sex, color, national origin, or disability in its hiring and employment practices, or in admission to, access to, or operation of its programs, services, and activities. With regard to all aspects of this contract, Contractor certifies and warrants it will comply with this policy. No person shall be excluded from participation in, be denied benefits of, be discriminated against in the admission or access to, or be discriminated against in treatment or employment in MNPS's contracted programs or activities, on the grounds of handicap and/or disability, age, race, color, religion, sex, national origin, or any other classification protected by federal or Tennessee State Constitutional or statutory law; nor shall they be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination in the performance of contracts with MNPS or in the

employment practices of MNPS's Contractors. Accordingly, all Proposers entering into contracts with MNPS shall, upon request, be required to show proof of such nondiscrimination and to post in conspicuous places that are available to all employees and applicants, notices of nondiscrimination.

- 23. Criminal Background Checks.** Contractor shall comply with Public Chapter 587 of 2007, as codified in Tennessee Code Annotated Section 49-5-413, which requires all contractors to facilitate a criminal history records check conducted by the Tennessee Bureau of Investigation and the Federal Bureau of Investigation for each employee prior to permitting the employee to have contact with students or enter school grounds when students are present.
- 24. Insurance.** Contractor shall maintain comprehensive general liability and automobile liability insurance, both with limits of not less than one million dollars and, if necessary, commercial umbrella insurance with limits of not less than \$1,000,000 per occurrence. Contractor shall maintain workers' compensation insurance with statutory limits as required by the State of Tennessee or other applicable laws and employers' liability insurance with limits of not less than \$500,000. A certificate of insurance, on a standard ACCORD form, evidencing said coverage shall be provided to MNPS prior to commencement of performance of this Contract. The METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY by and through the METROPOLITAN BOARD OF PUBLIC EDUCATION shall be included as an additional insured and this insurance shall apply as primary insurance with respect to any other insurance programs afforded MBPE. There shall be no endorsement or modification to make this insurance excess over other available insurance. **Throughout the term of this contract, Contractor shall provide an updated certificate of insurance upon expiration of the current certificate.** Additionally, MNPS shall maintain adequate Builders Risk/All Risk Insurance for the project covering products provided by the Contractor naming the Contractor as an additional insured.
- 25. Contingent Fees.** Contractor hereby represents that Contractor has not been retained or retained any persons to solicit or secure a Metropolitan Government contract upon an agreement or understanding for a contingent commission, percentage, or brokerage fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business. Breach of the provisions of this paragraph is, in addition to a breach of this contract, a breach of ethical standards which may result in civil or criminal sanction and/or debarment or suspension from being a contractor or subcontractor under Metropolitan Government contracts.
- 26. Gratuities and Kickbacks.** It shall be a breach of ethical standards for any person to offer, give or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or in any other advisory capacity

in any proceeding or application, request for ruling, determination, claim or controversy or other particular matter, pertaining to any program requirement of a contract or subcontract or to any solicitation or proposal therefor. It shall be a breach of ethical standards for any payment, gratuity or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or a person associated therewith, as an inducement for the award of a subcontract or order. Breach of the provisions of this paragraph is, in addition to a breach of this contract, a breach of ethical standards which may result in civil or criminal sanction and/or debarment or suspension from being a contractor or subcontractor under Metropolitan Government contracts.

27. Indemnification and Hold Harmless. Contractor shall indemnify and hold harmless MNPS, its officers, agents and employees from:

- a) Any claims, damages, costs and attorney fees for injuries or damages arising, in part or in whole, from the negligent or intentional acts or omissions of Contractor, its officers, employees and/or agents, including its sub or independent contractors, in connection with the performance of the contract, and, Contractor shall pay MNPS any expenses incurred as a result of Contractor's failure to fulfill any obligation in a professional and timely manner under this contract.
- b) Any claims, damages, penalties, costs and attorney fees arising from any failure of Contractor, its officers, employees and/or agents, including its sub or independent contractors, to observe applicable laws, including, but not limited to, labor laws and minimum wage laws.

28. Attorney Fees. Contractor agrees that, in the event either party deems it necessary to take legal action to enforce any provision of the contract, and in the event MNPS prevails, Contractor shall pay all expenses of such action including MNPS's attorney fees and costs at all stages of the litigation.

29. Assignment--Consent Required. The provisions of this contract shall inure to the benefit of and shall be binding upon the respective successors and assignees of the parties hereto. Except for the rights of money due to Contractor under this contract, neither this contract nor any of the rights and obligations of Contractor hereunder shall be assigned or transferred in whole or in part without the prior written consent of MNPS. Any such assignment or transfer shall not release Contractor from its obligations hereunder. NOTICE OF ASSIGNMENT OF ANY RIGHTS TO MONEY DUE TO CONTRACTOR UNDER THIS CONTRACT MUST BE SENT TO THE ATTENTION OF MNPS'S CHIEF ACCOUNTANT, DIVISION OF ACCOUNTS, DEPARTMENT OF FINANCE, 2601 BRANSFORD AVENUE, NASHVILLE, TENNESSEE 37204.

30. Entire Contract. This contract sets forth the entire agreement between the parties with respect to the subject matter hereof and shall govern the respective duties and obligations of the parties.

31. **Force Majeure.** No party shall have any liability to the other hereunder by reason of any delay or failure to perform any obligation or covenant if the delay or failure to perform is occasioned by *force majeure*, meaning any act of God, storm, fire, casualty, unanticipated work stoppage, strike, lockout, labor dispute, civil disturbance, riot, war, national emergency, act of Government, act of public enemy, or other cause of similar or dissimilar nature beyond its control.
32. **Governing Law.** The validity, construction and effect of this contract and any and all extensions and/or modifications thereof shall be governed by the laws of the State of Tennessee. Tennessee law shall govern regardless of any language in any attachment or other document that the Contractor may provide.
33. **Venue.** Any action between the parties arising from this agreement shall be maintained in the courts of Davidson County, Tennessee.
34. **Severability.** Should any provision of this contract be declared to be invalid by any court of competent jurisdiction, such provision shall be severed and shall not affect the validity of the remaining provisions of this contract.
35. **Confidentiality of Records.** All educational records created, disclosed or maintained pursuant to the terms of this contract are confidential and shall be created, disclosed and maintained pursuant to the provisions of Family Educational Rights and Privacy Act, also known as FERPA (20 U.S.C.A. s1232g), its regulations and Board policy.
36. **Compliance with the Americans with Disabilities Act.** The contractor will be required to provide assurances that it does not discriminate on the basis of disability in admission to, access to, or operations of its program, services, or activities, including *hiring or employment practices*. *The contractor will insure that qualified applicants and participants with disabilities in its services, programs, or activities* have communication access that is equally effective as that provided to people without disabilities. Information shall be made available in accessible formats and auxiliary aids and services shall be provided upon the reasonable request of a qualified person with a disability.
37. **Effective Date.** This contract shall not be binding upon the parties until it has been signed first by the Contractor and then by the authorized representatives of the Metropolitan Government and has been filed in the office of the Metropolitan Clerk. When it has been so signed and filed, this contract shall be effective as of the date first written above.

THE METROPOLITAN GOVERNMENT
OF NASHVILLE AND DAVIDSON
COUNTY BY AND THROUGH THE
METROPOLITAN BOARD OF PUBLIC
EDUCATION:

Director of Purchasing, MBPE:

[Signature]

RECOMMENDED:

Department Head

[Signature] COO 3-7-11

Department:

IT

APPROVED AS TO AVAILABILITY OF
FUNDS:

[Signature] 20

ACCOUNT NUMBER: multiple 00

[Signature]

Chief Financial Officer, MBPE

[Signature]

Chairman of the Board, MBPE

CONTRACTOR

BY: [Signature]

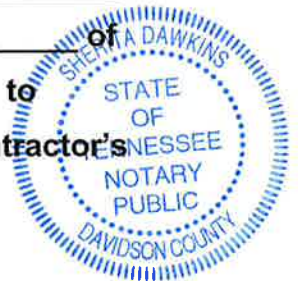
Title: Sr. V.P. & CFO

Sworn to and subscribed to before me, a
Notary Public, this 7th
day of March, 20011,
by Bex Miller,
the Sr. V.P. & CFO

of
Contractor and duly authorized to
execute this instrument on Contractor's
behalf.


[Signature]
Notary Public

My Commission Expires May 8, 2012



Director of Finance

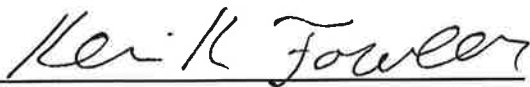
APPROVED AS TO INSURANCE:



Director of Insurance

APPROVED AS TO FORM AND

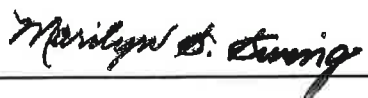
LEGALITY:



Metropolitan Attorney

FILED IN THE OFFICE OF THE

METROPOLITAN CLERK:



Date Filed: MAR 10 2011

EXHIBIT 4

Tips for Success

- Third-party entities conducting competitive bidding
 - Non-state agencies that conduct the competitive bidding and contract negotiations on behalf of schools or libraries
 - (e.g., Joint Power Authorities)
 - Must have a Letter of Agency (LOA) from each school and/or library signed on or before the FCC Form 471 certification postmark date

EXHIBIT 5

From: Bayersdorfer, Tom (MNPS)
Sent: Tuesday, September 27, 2011 10:13 AM
To: 'Cayer@usac.org'
Subject: LOA Issue from training

Catriona,

(I don't have Leslie's email address or I would sent this to her as well)

This email is a follow-up to a discussion we had at the E-Rate training yesterday.

In December 2010, I solicited participation in the "Tennessee E-Rate Consortium" for the procurement of Internet Access and Telecommunications and Telecommunication Services.

I had 79 LEAs sign LOAs (see attached sample). I posted a form 470 listing participating LEAs.

Below is the overview from the beginning of the 2011 RFP:

A. Overview

The Metropolitan Nashville Public Schools (MNPS) is requesting proposals on behalf of MNPS and the Tennessee E- Rate Consortium (Consortium) whose members have furnished a Letter of Agency (LOA) to MNPS for the purpose of securing services.

These services are intended to be eligible for the Federal Communications Commission's (FCC) Universal Service Program for Schools and Libraries known commonly as E-Rate. The method for all of the K-12 public school districts of Tennessee to purchase from this contract is Tennessee Code Annotated, Title 12, Chapter 3, Part 10, which effectively allows Local Education Agencies, hereafter referred to as LEA, to make purchases based on the terms of a contract signed by another LEA. The funding for this contract comes from both LEA funds and the Federal E-Rate program. The technical and functional requirements for providing the necessary bundled, Internet access and management of the overall service offering must be flexible, scalable, and creatively approached by the proposing service provider. E-Rate Funding for the public schools will continue to be an overriding factor in determining what kind of technology and service offerings can be deployed throughout the Consortium's public school system environment.

The RFP had two responders, AT&T & Education Networks of America (the incumbent provider). The responses were evaluated and a contract was awarded to ENA. There was also a previous consortium that was based on a 5 year contract that runs through June 30, 2012. Most of the new consortium members were also members of the previous consortium as well.

All of the members of the consortium file their own form 471 based on the form 470 that I posted on behalf of the consortium in February 2011. The 470 referred to an RFP that was issued by Metro-Nashville Public Schools (BEN# 128258) to that reach the stated purpose of securing a contract for five years (see overview above). The LOA that was used is attached to this email.

That brings me to the current question. Since the rules state that the LOA must be signed prior to the posting of the form 471, which will be posted by the individual LEAs, can LEAs sign an LOA at this time for the purpose of posted a 471 for the 2012-2013 program year?

The LEAs would cite the 470 that was posted for the consortium in February 2011, sign an LOA and a cooperative purchasing agreement, providing it to me as the lead of the consortium prior to filing their own form 471 for the 2012-2013 program year.

Are there any reasons that this would not be within the rules?

Thanks for your help on this.

Tom

Tom Bayersdorfer

Resource Manager * District E-Rate Coordinator
Technology and Information Services
Metropolitan Nashville Public Schools
2601 Bransford Ave/Nashville, TN 37204
615-259-8502 * 615-291-6068 (Fax)
tom.bayersdorfer@mnps.org

EXHIBIT 6

Bayersdorfer, Tom (MNPS)

From: Leslie Frelow <lfullwood@usac.org>
Sent: Thursday, October 06, 2011 1:15 PM
To: Bayersdorfer, Tom (MNPS)
Subject: Re: LOA Issue from training

Yes. Good luck
Leslie

From: Bayersdorfer, Tom (MNPS) [mailto:Tom.Bayersdorfer@mnps.org]
Sent: Thursday, October 06, 2011 01:05 PM
To: Leslie Frelow
Subject: FW: LOA Issue from training

Leslie,

I want to make sure I understand your response:

The Tennessee E-Rate Consortium, for which Metro-Nashville Public Schools (BEN 128258) is the consortium lead and I am listed contact on the form, posted a Form 470 Application Number: 534070000900066 with the Certification Received Date: 02/04/2011.

The form 470 did not include the Loudon County School District (BEN 128362). They now want to sign the LOA, that you reviewed from an email earlier in this email string (see below), and join the Tennessee E-Rate Consortium for the 2012-2013 program year as well as future years on the contract.

Each member school district of the consortium will file their own form 471.

Based on your email, that is allowable under the rules of the program. Am I Correct?

Thanks for your help on this.

Tom

Tom Bayersdorfer

Resource Manager * District E-Rate Coordinator
Technology and Information Services
Metropolitan Nashville Public Schools
2601 Bransford Ave/Nashville, TN 37204
615-259-8502 * 615-291-6068 (Fax)
tom.bayersdorfer@mnps.org

From: Leslie Frelow [mailto:lfullwood@usac.org]
Sent: Friday, September 30, 2011 8:36 AM
To: Bayersdorfer, Tom (MNPS)
Subject: RE: LOA Issue from training

Hello Tom:

I reviewed the LOA. It is permissible under E-rate rules to allow those other members to join the Tennessee E-rate Consortium. It is not uncommon for members to join or leave a consortium after the competitive bidding and vendor selection is completed. The new consortium members' LOAs must be signed and completed by the Form 471 certification postmark date.

L -

From: Bayersdorfer, Tom (MNPS) [mailto:Tom.Bayersdorfer@mnps.org]
Sent: Wednesday, September 28, 2011 10:25 AM
To: Leslie Frelow
Subject: FW: LOA Issue from training

Leslie,

Can you reply that this email made it to you?

Thanks

Tom

Tom Bayersdorfer

Resource Manager * District E-Rate Coordinator
Technology and Information Services
Metropolitan Nashville Public Schools
2601 Bransford Ave/Nashville, TN 37204
615-259-8502 * 615-291-6068 (Fax)
tom.bayersdorfer@mnps.org

From: Bayersdorfer, Tom (MNPS)
Sent: Tuesday, September 27, 2011 10:13 AM
To: 'Cayer@usac.org'
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This email is a follow-up to a discussion we had at the E-Rate training yesterday.

In December 2010, I solicited participation in the "Tennessee E-Rate Consortium" for the procurement of Internet Access and Telecommunications and Telecommunication Services. I had 79 LEAs sign LOAs (see attached sample). I posted a form 470 listing participating LEAs.

Below is the overview from the beginning of the 2011 RFP:

A. Overview

The Metropolitan Nashville Public Schools (MNPS) is requesting proposals on behalf of MNPS and the Tennessee E-Rate Consortium (Consortium) whose members have furnished a Letter of Agency (LOA) to MNPS for the purpose of securing services.

These services are intended to be eligible for the Federal Communications Commission's (FCC) Universal Service Program for Schools and Libraries known commonly as E-Rate. The method for all of the K-12 public school

districts of Tennessee to purchase from this contract is Tennessee Coda Annotated, Title 12, Chapter 3, Part 10, which effectively allows Local Education Agencies, hereafter referred to as LEA, to make purchases based on the terms of a contract signed by another LEA. The funding for this contract comes from both LEA funds and the Federal E-Rate program. The technical and functional requirements for providing the necessary bundled, Internet access and management of the overall service offering must be flexible, scalable, and creatively approached by the proposing service provider. E-Rate Funding for the public schools will continue to be an overriding factor in determining what kind of technology and service offerings can be deployed throughout the Consortium's public school system environment.

The RFP had two responders, AT&T & Education Networks of America (the incumbent provider). The responses were evaluated and a contract was awarded to ENA. There was also a previous consortium that was based on a 5 year contract that runs through June 30, 2012. Most of the new consortium members were also members of the previous consortium as well.

All of the members of the consortium file their own form 471 based on the form 470 that I posted on behalf of the consortium in February 2011. The 470 referred to an RFP that was issued by Metro-Nashville Public Schools (BEN# 128258) to that reach the stated purpose of securing a contract for five years (see overview above). The LOA that was used is attached to this email.

That brings me to the current question. Since the rules state that the LOA must be signed prior to the posting of the form 471, which will be posted by the individual LEAs, can LEAs sign an LOA at this time for the purpose of posted a 471 for the 2012-2013 program year?

The LEAs would cite the 470 that was posted for the consortium in February 2011, sign an LOA and a cooperative purchasing agreement, providing it to me as the lead of the consortium prior to filing their own form 471 for the 2012-2013 program year.

Are there any reasons that this would not be within the rules?

Thanks for your help on this.

Tom

Tom Bayersdorfer

Resource Manager * District E-Rate Coordinator
Technology and Information Services
Metropolitan Nashville Public Schools
2601 Bransford Ave/Nashville, TN 37204
615-259-8502 * 615-291-6068 (Fax)
tom.bayersdorfer@mnps.org

EXHIBIT 7

Intent to Purchase Internet Access Services

This agreement of Intent ("Agreement") is initiated on (insert date) January 30, 2012

between Athens City Schools (name of school system), hereinafter referred to as "Tennessee School System" and ENA Services, LLC, Nashville, Tennessee, hereinafter referred to as "ENA."


Tennessee School System agrees to obtain certain Internet Access and/or Telecommunication Services from ENA, based on the Metropolitan Nashville Public Schools (MNPS) contract.

Tennessee School system agrees to request budget in 2012-2013 for the requested services. However, this agreement of Intent may be null and void if funds for these services are not appropriated in the budget approved for the Tennessee School System for the 2012-2013 fiscal year.

In the event that the Tennessee School System's Universal Service E-Rate discount is not approved due to inaccurate certifications of the Tennessee School System to the FCC or SLD, ENA may recover 100% of the cost of delivered services from the Tennessee School System.

AGREED TO:

Tennessee School System: Athens City Schools

Signature of Authorized Person 

Printed name and Title of Authorized Person Robert W. Greene, Director of Schools

Date Signed 1/30/2012

For ENA:

Signature of Authorized Person 

Printed Name and Title of Authorized Person: Rex Miller Sr. V.P.

Date Signed 2/23/12

EXHIBIT 8

Athens City

Estimated E-Rate Discount ----->
471 Pricing Schedule - 2012-2013

80%

Site Name	Site ID	Standard Filtering	Custom Filtering	Traffic Prioritization	100mb Router	Firewall	Current Connect	Requested Connect	Monthly Cost w/o E-Rate	E-Rateable	Monthly Cost w/ E-Rate
Athens City School District Building	5410000						100,000	100,000	1,500	1,500	300
Athens City School District Building	5410000	Yes					19,000	25,000	2,685	2,680	541
Athens City Middle School	5410005	Yes					100,000	100,000	1,555	1,550	315
City Park Elementary School	5410010	Yes					100,000	100,000	1,555	1,550	315
Ingleside Elementary School	5410020	Yes					100,000	100,000	1,555	1,550	315
North City Elementary School	5410025	Yes					100,000	100,000	1,555	1,550	315
Westside Elementary School	5410030	Yes					100,000	100,000	1,555	1,550	315

Monthly Subtotal	11,960	11,930	2,416
Gaggle->	-	-	-

Monthly Total	11,960	11,930	2,416
Annual Total	143,520	143,160	28,992

EXHIBIT 9

Tennessee E-Rate Consortium

Tom Bayersdorfer
Metropolitan Nashville Public Schools
2601 Bransford Avenue
Nashville, TN 37204

Re: Letter of Agency For Funding Years 2011 - 2015

This is to confirm our participation in the Tennessee E-rate Consortium for the procurement of Internet Access and Telecommunications and Telecommunication Services. I hereby authorize Tennessee E-rate Consortium to submit FCC Forms 470, 471, and other E-rate forms to the Schools and Libraries Division of the Universal Service Administrative Company on behalf of the Athens City Schools (name of Billed Entity).

I understand that, in submitting these forms on our behalf, you are making certifications for Athens City Schools (name of Billed Entity). By signing this Letter of Agency, I make the following certifications:

- (a) I certify that Athens City Schools [LEA Name] are all schools under the statutory definitions of elementary and secondary schools found in the No Child Left Behind Act of 2001, 20 U.S.C. §§ 7801(18) and (38), that do not operate as for-profit businesses and do not have endowments exceeding \$50 million.

I certify that school libraries [library, libraries in your system] are eligible for assistance from a State Library Administrative Agency under the Library Services and Technology Act of 1996, Pub. L. No. 104-208, § 211 et seq., 110 Stat. 3009 (1996) that do not operate as for-profit businesses and whose budgets are completely separate from any school (including, but not limited to elementary, secondary schools, colleges, or universities).


- (b) I certify that our LEA (e.g. LEA or library(ies)) has/have secured access, separately or through this program, to all of the resources, including computers, training, software, internal connections, maintenance, and electrical capacity, necessary to use the services purchased effectively. I recognize that some of the aforementioned resources are not eligible for support. I certify that to the extent that the Billed Entity is passing through the non-discounted charges for the services requested under this Letter of Agency, that the entities I represent have secured access to all of the resources to pay the non-discounted charges for eligible services from funds to which access has been secured in the current funding year.

- (c) I certify that the services the school, library or district purchases at discounts provided by 47 U.S.C. § 254 will be used primarily for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value, except as permitted by the rules of the Federal Communications Commission (Commission or FCC) at 47 C.F.R. § 54.500(et seq.).

- (d) I certify that our LEA (e.g. LEA or library(ies)) has complied with all program rules and I acknowledge that failure to do so may result in denial of discount funding and/or cancellation of funding commitments. I acknowledge that failure to comply with program rules could result in civil or criminal prosecution by the appropriate law enforcement authorities.

- (e) I acknowledge that the discount level used for shared services is conditional, for future years, upon ensuring that the most disadvantaged schools and libraries that are treated as sharing in the service, receive an appropriate share of benefits from those services.
- (f) I certify that I will retain required documents for a period of at least five years after the last day of service delivered. I certify that I will retain all documents necessary to demonstrate compliance with the statute and Commission rules regarding the application for, receipt of, and delivery of services receiving schools and libraries discounts, and that if audited, I will make such records available to the Administrator. I acknowledge that I may be audited pursuant to participation in the schools and libraries program.
- (g) I certify that I am authorized to order telecommunications and other supported services for the eligible entity(ies) covered by this Letter of Agency. I certify that I am authorized to make this request on behalf of the eligible entity(ies) covered by this Letter of Agency, that I have examined this Letter, that all of the information on this Letter is true and correct to the best of my knowledge, that the entities that will be receiving discounted services under this Letter pursuant to this application have complied with the terms, conditions and purposes of the program, that no kickbacks were paid to anyone and that false statements on this form can be punished by fine or forfeiture under the Communications Act, 47 U.S.C. §§ 502, 503(b), or fine or imprisonment under Title 18 of the United States Code, 18 U.S.C. § 1001 and civil violations of the False Claims Act.
- (i) I acknowledge that FCC rules provide that persons who have been convicted of criminal violations or held civilly liable for certain acts arising from their participation in the schools and libraries support mechanism are subject to suspension and debarment from the program. I will institute reasonable measures to be informed, and will notify USAC should I be informed or become aware that I or any of the entities, or any person associated in any way with my entity and/or the entities, is convicted of a criminal violation or held civilly liable for acts arising from their participation in the schools and libraries support mechanism.
- (j) I certify, on behalf of the entities covered by this Letter of Agency, that any funding requests for internal connections services, except basic maintenance services, applied for in the resulting FCC Form 471 application are not in violation of the Commission requirement that eligible entities are not eligible for such support more than twice every five funding years beginning with Funding Year 2005 as required by the Commission's rules at 47 C.F.R. § 54.506(c).
- (k) I certify that, to the best of my knowledge, the non-discount portion of the costs for eligible services will not be paid by the service provider. I acknowledge that the provision, by the provider of a supported service, of free services or products unrelated to the supported service or product constitutes a rebate of some or all of the cost of the supported services.
- (l) I certify that I am authorized to sign this Letter of Agency and, to the best of my knowledge, information, and belief, all information provided to [name of Consortium] for E-rate submission is true.

Name of Entity: Athens City Schools
(LEA or Library System)

Signature: 

Date: 1/30/2012

Name: Robert W. Greene

Title: Director of Schools